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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 691

OSCAR R. BOLTON and LILLY BOLTON,
Appellants.

v.

BOROUGH OF SCHUYLKILL HAVEN,
Appellee.

On Appeal From the Superior Court of Pennsylvania.

MOTION TO DISMISS APPEAL

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February 27, 1961.

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sewer rentals, charges and connection fees, which, in the aggregate, were deemed to be sufficient to pay the fixed rental to the Authority and to pay the cost of operation, repair, and maintenance of the sewer system and sewage treatment plant.

In order to fulfill the mandate of the Sanitary Water Board of the Commonwealth of Pennsylvania, the Borough adopted Ordinance No. 321 on April 4, 1950, whereby privies, cesspools, and septic tanks were prohibited within the Borough and also barred the discharge of any sewage into the waters of the Commonwealth (Transcript, p. 18). The ordinance further provided that all properties within the Borough must be connected to the sewerage system after three months' notice to do so under a penalty of thirty ($30.00) dollars fine. Appellants were duly notified to connect to the sewerage system (Transcript, p. 19) but failed to do so and a suit was instituted by the Borough against the within appellants in September, 1954, for the collection of the penalty. After jury trial, a verdict in favor of the plaintiff Borough was duly entered in the Court of Common Pleas of Schuylkill County and judgment entered thereon. Motion for judgment n. o. v. and a new trial were refused by the trial court, and the Superior Court of Pennsylvania affirmed the judgment on August 10, 1959. Four petitions for allocatur to the Supreme Court of Pennsylvania were refused and notice of appeal was subsequently lodged with your Honorable Court.

MOTION TO DISMISS UNDER SUPREME COURT RULE 16 (1) (b).

A. THE QUESTIONS PRESENTED BY APPELLANTS DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

Ordinance No. 321 of the Borough of Schuylkill Haven (Transcript, p. 18) is the ordinance under which appellants were sued, and it clearly sets forth in its preamble that the purpose to be accomplished thereby was to "promote the health, safety and welfare of the people of the Borough of Schuylkill Haven and of the Commonwealth of Pennsylvania, and the purity of its streams . . . ." This type of ordinance is a common and increasingly necessary exercise of the police power of a municipality and its enforcement is essential to public health. HUTCHINSON v. CITY OF VALDOSTA, 227 U. S. 303, 57 L. Ed. 520. The duty of connection to a sanitary sewer system may be enforced by criminal penalties. DISTRICT OF COLUMBIA v. BROOKE, 214 U. S. 138, 53 L. Ed. 941, 29 Sup. Ct. Rep. 560; NOURSE v. RUSSELLVILLE, 257 Ky. 5.

The fact that Ordinance No. 321, in conjunction with Ordinance No. 333, fixes certain charges and penalties upon those who, voluntarily or involuntarily use the system, does not render the ordinances unconstitutional unless the legislative enactments are designed for the sole purpose of

raising revenue, or the rates charged for the service be unreasonable. There is no contention that the rates and charges are exorbitant or unreasonable. The complaint seems to be that because the two ordinances do impose rentals, they are a flagrant abuse of the police power and therefore violate the 14th Amendment to the Constitution of the United States. It is neither the sole nor primary object of this ordinance to raise revenue. Its sole purpose is to protect the health of the citizens of the Borough by barring privies, cesspools and septic tanks and replacing them by a sanitary sewer system and sewerage treatment plant. Rates and rentals must, of course, be charged for the proper operation and maintenance of the sewer system and for the payment of the debt service charges. The Act of the General Assembly of the Commonwealth of Pennsylvania of July 18, 1935, P. L. 1286, as amended, (53 Purdon's Statutes, Sec. 2231 and 2232) specifically empowers the collection of sewer charges sufficient to maintain the system and amortize the bonded indebtedness. The constitutionality of that Act is not questioned in these proceedings.

Furthermore, the Borough was compelled to construct and maintain the sewer system and sewerage treatment plant by the mandate of the Sanitary Water Board of the Commonwealth of Pennsylvania, under the Pure Streams Act of June 22, 1937, P. L. 1987 (35 Purdon's Statutes, Sec. 691.1, et seq). The constitutionality of that statute has been judicially determined in a num-

ber of cases. See EVANS v. NORRITON TWP. MUNICIPAL AUTHORITY, 370 Pa. 150, 87 Atl. 2nd 474; COMMONWEALTH, EX REL SHUMAKER v. N. Y. AND PA. CO., 367 Pa. 40, 79 Atl. 2nd 439; COMMONWEALTH, EX REL WOODSIDE v. BRIDGEPORT BOROUGH, 378 Pa. 406, 106 Atl. 2nd 615; COMMONWEALTH v. SONNEBORN, 164 Pa. Sup. 493; 60 Atl. 2nd 594.

The contention that Ordinance No. 333 requiring the signing of a contract for sewer services before connection to the sewer is permitted, is violative of the 13th Amendment because Ordinance No. 321 makes connection to the sewer system compulsory, is arrived at by strained reasoning and tortuous argument. The former ordinance is regulatory only and permission to connect cannot be refused to any who desire the service, provided they comply in all other respects with the ordinance. STERLING v. CITY OF PHILA., 373 Pa. 538, 106 Atl. 2nd 793. The latter ordinance makes it a violation to refuse to connect after notice so to do but does not bar or prohibit voluntary connection. Due process, liberty of contract or freedom of speech are not involved.

Appellants have failed to meet the burden of establishing the unconstitutionality of the ordinances, much less have they overcome the presumption of constitutionality prevailing in all legislative enactments. LOOMIS v. BOARD OF EDUCATION, 376 Pa. 428; ENGLISH v. SCHOOL

DISTRICT OF ROBINSON TWP., 358 Pa. 45; HOTEL CASEY v. ROSS, 343 Pa. 573; CAVANAUGH v. GELDER, 364 Pa. 361; HENDERSON BRIDGE CO. v. CITY OF HENDERSON, 173 U. S. 592, 43 L. Ed. 823.

The questions presented by appellants do not raise a new, real and substantial Federal question. BLUMENSTOCK BROS. v. CURTIS PUBL. CO., 252 U. S. 436; ZUCHT v. KING, 260 U. S. 174, 67 L. Ed. 194. They are mere assertions, frivolous in nature, palpably without foundation or support in reason. See McCAIN v. DES MOINES, 174 U. S. 168, 43 L. Ed. 936; CONN v. RINGER, 32 Fed. 2nd 639.

The appeal should therefore be dismissed because a substantial Federal question is not fairly and reasonably involved.

B. THE APPEAL SHOULD BE DISMISSED UNDER SUPREME COURT RULE 16 (1) (a) BECAUSE NOT TAKEN IN CONFORMITY WITH RULE 13 (1).

Notice of appeal to your Honorable Court was lodged February 23, 1960, and on April 20, 1960, appellants secured from the Honorable Chief Justice Jones of the Supreme Court of Pennsylvania an order enlarging the time for perfecting the appeal to this court, "until the expiration of sixty days from the date of final determination by the Supreme Court of Pennsylvania of the jurisdictional validity of the judgment of the Superior Court appealed from." On April 20, 1960, the appellants requested the Superior Court of Pennsylvania to vacate its judgment which was refused by said court on April 26, 1960. On June 9, 1960, appellants petitioned the Supreme Court of Pennsylvania for an allocatur from the refusal of the Superior Court of Pennsylvania to vacate its judgment which was denied on June 20, 1960. On August 1, 1960, appellants again petitioned the Supreme Court of Pennsylvania to reconsider its previous refusal of an allocatur which was again disallowed per curiam on September 30, 1960. On the 60th day following the last refusal, November 29, 1960, appellants again petitioned the Supreme Court of Pennsylvania for clarification and reconsideration of its last refusal of an allocatur which was again dismissed per curiam on December 6, 1960.

Motion to Dismiss Appeal

On December 17, 1960, the appellee Borough petitioned the Supreme Court of Pennsylvania to dismiss appellant's appeal to your Honorable Court because the same was not perfected within the time prescribed by Supreme Court Rule 13(1) which petition was dismissed by said court on January 14, 1961. On February 2, 1961, the Jurisdictional Statement was served upon appellee.

It is apparent from the above that appellants did not file their Jurisdictional Statement within the sixty-day period after the refusal of an allocatur by the Supreme Court of Pennsylvania which was first denied on June 20, 1960. Two other petitions for allocatur were subsequently filed and refused. It is the contention of the appellee that the last two petitions for allocatur were dilatory only and that the sixty-day period should have run from June 30, 1960, rather than December 6, 1960, and jurisdiction should be denied.

CONCLUSION.

The alleged Federal questions presented by appellants are not substantial and arise from the pleadings only and are mere assertions, frivolous in nature, palpably without foundation and have no support in reason, and the appeal should therefore be dismissed.

The appeal should be dismissed on the further grounds that the appeal was not perfected within the time prescribed by the Rules of your Honorable Court.

Respectfully submitted,

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